BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOSE VELASQUEZ Claimant	)	
VS.	)	
AM COHRON & SON, INC. Respondent	)	Docket No. **1,038,149**
AND	)	
BITUMINOUS CASUALTY CORP. Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the October 7, 2010 Award by Administrative Law Judge Brad E. Avery. The Board heard oral argument on February 18, 2011.

APPEARANCES

George H. Pearson of Topeka, Kansas, appeared for the claimant. Ali N. Marchant of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the parties agreed that the medical records of St. Francis Health Center, Leighton York, ARNP/Stormont-Vail Hospital and William A. Bailey, M.D./Lawrence Orthopaedic Surgery, identified and attached to the Stipulation filed June 1, 2010, are included in the evidentiary record.

ISSUES

Jose Velasquez suffered accidental injury while working for respondent on October 16, 2007. It was undisputed that he injured his right knee. He also claimed permanent injury to his back. The nature and extent of disability, specifically whether

claimant was limited to compensation for a scheduled disability or compensation for a whole body impairment, was the sole issue raised before the Administrative Law Judge (ALJ). Respondent argued claimant did not have back complaints until he was examined by his medical expert in June 2008. Claimant argued that he complained of back pain throughout his treatment but the knee injury was initially the more significant injury as it required surgery. And that he did receive treatment for his back complaints following the surgery for his knee.

The ALJ awarded claimant compensation for a 10 percent scheduled disability to the right lower extremity and because claimant suffered permanent impairment to his back the ALJ also awarded claimant compensation for a whole body 59 percent work disability beginning June 19, 2010.

Respondent requests review of the nature and extent of claimant's disability, i.e. work disability. Respondent contends claimant has only suffered a scheduled injury to his right lower extremity. Respondent further argues claimant's accidental injury to his back did not arise out of and in the course of employment, therefore he is not entitled to a work disability. In the alternative, respondent argues that claimant does not have any permanent work restrictions as a result of his injury and thus should not have any task loss.

Claimant argues he is entitled to a work disability for his back injury as well as a scheduled injury to the lower extremity and, therefore, the ALJ's Award should be affirmed.

The sole issue for Board determination is the nature and extent of disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

On October 16, 2007, claimant was unloading a truck and had to jump off the truck to avoid getting hit by a falling utility pole. He landed on his right knee and had immediate pain in the right knee and hip. Claimant testified that since the accident he has had pain from his knee all the way up to his mid back. A former co-worker and friend of claimant's, Steve Perdue, acted as an interpreter and accompanied claimant on his visits to the doctors as well as the vocational expert. Mr. Perdue testified that claimant always complained of pain from his right knee up to the small of his lower back and that is what Mr. Perdue told the doctors.

Claimant was taken to the Medical Arts Clinic and examined by Leighton York, a nurse practitioner. Mr. York diagnosed claimant with a contusion to the knee. Restrictions of no lifting, pushing and pulling greater than 25 pounds. A follow-up visit on October 23, 2007, revealed claimant had a mild limp as well as right knee pain on palpation.

Restrictions of no climbing ladders, lifting pushing and pulling greater than 20 pounds as well as limited bending and twisting of the right knee. The October 30, 2007 office visit revealed no pain on palpation or ROM of the right knee, no swelling or bruising and ambulation was normal. It was noted that claimant complained of pain into his right hip. Mr. York again diagnosed claimant with right knee contusion. The treatment plan was to continue ice and elevation, perform an exercise regimen while gradually increasing work demands and continue the anti-inflammatories. Claimant was released to return to full-duty work on November 1, 2007.

On December 19, 2007, claimant sought medical treatment at St. Francis Hospital due to complaints of pain in his right knee up to his right hip. The medical records of that visit indicate claimant complained of pain from his knee up past his right hip. A neoprene brace was provided to claimant and he was referred to physical therapy, placed on limited duty, and advised to take Ibuprofen for pain.

On December 21, 2007, claimant was again seen and evaluated by Mr. York due to right knee pain. Upon examination, Mr. York found that claimant had pain in his right knee on palpation of the medial and lateral joint line as well as the popliteal fossa. Again, claimant was diagnosed with a contusion to the right knee. Claimant was to continue the heat and ice to reduce pain as well as exercise. Claimant was allowed to return to regular duty. Mr. York recommended an MRI which was performed on December 26, 2007. On January 2, 2008, claimant returned for a follow-up visit regarding the outcome of his MRI which revealed a medial and lateral meniscal tear.

Claimant was referred to Dr. Michael Yost, an orthopedic surgeon, who performed arthroscopic surgery on claimant's right knee on January 23, 2008. The doctor repaired both cartilage, lateral and medial as well as removed the synovium which was hypertrophied and/or inflamed. Claimant was provided temporary restrictions and went through extensive physical therapy.

Dr. Lynn Curtis examined and evaluated claimant on June 4, 2008, at claimant's attorney's request. The doctor took a past history from claimant and reviewed his medical records. Upon physical examination, Dr. Curtis found swelling from the lateral and medial portions of the right knee and right thigh atrophy as well as pain radiating in the right knee and lumbar paraspinal spasm on the right. Dr. Curtis diagnosed claimant with status post repair of partial lateral and medial meniscus, persistent swelling in the knee, SP synovectomy, Le lumbar radiculopathy with motor and sensory loss on the right, thigh atrophy on the right, persistent sciatica into right thigh and an aggravation of back and knee injury with delayed treatment. The doctor recommended the following treatment: (1) MRI of the back; (2) flexion-extension films of the lumbar spine; and, (3) spine consultation to establish whether he has any instability, disc herniation or fracture.

Claimant's last appointment with Dr. Yost occurred on June 17, 2008. At that time claimant had reached maximum medical improvement for his knee but he was complaining

of radiating back pain. Dr. Yost testified that claimant had not complained of back pain during treatment for his knee until that appointment. Dr. Yost referred claimant to Dr. William Bailey, a spine surgeon, for his complaints of back and hip pain. Based on the AMA *Guides*[1], Dr. Curtis rated claimant's right knee injury at 4 percent.

After a preliminary hearing, claimant was provided treatment for his back complaints from Dr. Bailey. The doctor diagnosed lumbar strain with radiculitis and referred him for physical therapy. On February 24, 2009, Dr. Bailey released claimant from treatment and did not impose any permanent restrictions.

Claimant returned to work for respondent but noted that because of ongoing back pain he self-imposed limits on his work activities. Claimant testified he was able to do the work without restrictions that respondent had available in Kansas. He further testified that his job had changed in order for him to be able to do the work. Claimant does not lift anything that is very heavy and tries to do things differently. Claimant advised Dr. Bieri that he works within his pain tolerance and he still has pain all day long.

On April 23, 2009, claimant was again examined and evaluated by Dr. Curtis. Upon physical examination, the doctor opined claimant had reached maximum medical improvement with regard to his back. Using the AMA *Guides*, Dr. Curtis rated claimant's back at 7 percent whole person impairment due to problems with his sciatica, loss of sensation in his thigh and continued to have low back pain. The doctor also rated claimant's right knee again due to medical improvement which resulted in a 13 percent right lower extremity impairment. Another 7 percent rating was given for claimant's lumbar radiculopathy. Using the Combined Value Charts, Dr. Curtis opined claimant had a 12 percent whole person impairment as 7 percent for lateral collateral, 10 percent partial menisectomy, 7 percent synovitis/arthritis and 10 percent range of motion impairment. Using the Combined Value Charts, claimant's lower extremity results in a 30 percent.

Dr. Curtis placed permanent restrictions on claimant of no crawling frequently, no lifting greater than 100 pounds and no use of vibrating equipment by himself. Dr. Curtis opined that claimant's back problem was caused by his injury at work. Dr. Curtis reviewed the list of claimant's former work tasks prepared by Mr. Dick Santner and concluded claimant could no longer perform 3 of the 17 tasks for an 18 percent task loss.

Mr. Dick Santner, a vocational rehabilitation counselor, conducted a personal interview with claimant on January 13, 2010, at the request of claimant's attorney. He prepared a task list of 17 nonduplicative tasks claimant performed in the 15-year period before his injury. At the time of the interview, claimant was accompanied by an interpreter, Mr. Perdue, in order to complete the assessment.

---

[1] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

On July 16, 2009, the ALJ issued an Order Referring Claimant For Independent Medical Examination with Dr. Peter Bieri. On September 3, 2009, Dr. Bieri examined claimant. The doctor determined claimant was at maximum medical improvement and opined he suffered a 10 percent right lower extremity functional impairment which translates to a 4 percent whole person impairment. And Dr. Bieri further opined claimant had a 5 percent whole person impairment pursuant to the AMA *Guides*, DRE Lumbosacral Category II. Dr. Bieri further noted the combined whole person impairment would be 9 percent. Finally, the doctor noted claimant had been released without formal restrictions, and functions within pain tolerance which the doctor concluded appeared reasonable and appropriate.

Claimant continued working for respondent until June 19, 2010. At that time claimant quit his employment because he did not want to move his family to Iowa where respondent had offered him work. The claimant had not obtained other employment by the time the record closed.

Respondent initially argues that claimant did not meet his burden of proof that he suffered a back injury. The medical records while claimant was receiving treatment for his right knee did not reveal back complaints. Nonetheless, claimant and his interpreter testified that he told the treating physicians about pain up into his back. And the nurse practitioner had told claimant that his back would get better with time. Early on the medical records did note pain complaints past the hip and some referenced pain into the hip. After the knee was surgically repaired, claimant returned to work but had increasing low back complaints which ultimately resulted in treatment from Dr. Bailey. And although claimant continued working for respondent his uncontradicted testimony was that he changed the manner that he performed his work activities. Although the doctors had not imposed restrictions it is clear claimant continued working by self limiting his activities and not lifting anything heavy. The Board finds that claimant has met his burden of proof that he suffered permanent injury to his knee and his back as a result of the work-related accident.

The ALJ concluded that when there are both scheduled and nonscheduled injuries suffered in an accident the claimant is to receive two awards, one for the scheduled injury and one for the whole body injury. The Board disagrees.

In *Bryant*[2], the Kansas Supreme Court stated the general rule:

> If a worker sustains only an injury which is listed in the -510d schedule, he or she cannot receive compensation for a permanent partial general disability under -510e. If, however, the injury is both to a scheduled member and to a nonscheduled portion of the body, compensation should be awarded under -510e.

[2] *Bryant v. Excel*, 239 Kan. 688, 689, 722 P.2d 579 (1986).

Thus, as in this case where there are injuries to both a scheduled member (knee) and to a nonscheduled portion of the body (back), the disabilities should be combined and compensation should be awarded under K.S.A. 44-510e.[3]

The ALJ adopted the court ordered medical examiner's functional impairment ratings as the most persuasive. The Board agrees and adopts Dr. Bieri's rating opinion that as a result of his work-related injuries claimant suffered a 9 percent whole person functional impairment.

The injury to claimant's low back is not an injury addressed in the schedule of K.S.A. 44-510d. Accordingly, claimant's permanent partial general disability benefits are governed by K.S.A. 44-510e, which requires claimant's wage loss to be averaged with his task loss.

In *Bergstrom*,[4] the Kansas Supreme Court interpreted K.S.A. 44-510e, which governs the computation of claimant's permanent partial general disability, and ruled that it is not proper to impute a post-injury wage when computing the wage loss in the permanent partial general disability formula. The Kansas Supreme Court stated, in pertinent part:

> When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, there is no need to resort to statutory construction.[5]
>
> K.S.A. 44-510e(a) contains no requirement that an injured worker make a good-faith effort to seek postinjury employment to mitigate the employer's liability. *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 320, 944 P.2d 179 (1997), and all subsequent cases that have imposed a good-faith effort requirement on injured workers are disapproved.[6]
>
> We can find nothing in the language of K.S.A. 44-510e(a) that requires an injured worker to make a good-faith effort to seek out and accept alternate employment. The legislature expressly directed a physician to look to the tasks that the employee

---

[3] See also *Goodell v. Tyson Fresh Meats*, 43 Kan. App. 2d 717, 235 P.3d 484 (2009); *McCready v. Payless Shoesource*, 41 Kan. App. 2d 79, 200 P.3d 479 (2009).

[4] *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

[5] *Id.*, Syl. ¶ 1.

[6] *Id.*, Syl. ¶ 3.

> performed during the 15-year period preceding the accident and reach an opinion of the percentage that can still be performed. That percentage is averaged together with the difference between the wages the worker was earning at the time of the injury and the wages the worker was earning after the injury. The legislature then placed a limitation on permanent partial general disability compensation when the employee "*is engaging* in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury." (Emphasis added.) K.S.A. 44-510e(a). The legislature did not state that the employee is required to *attempt to work* or that the employee *is capable of engaging in work* for wages equal to 90% or more of the preinjury average gross weekly wage.[7]

In the absence of *Bergstrom*, the reasons for claimant's quitting his job and his efforts to retain his employment would have been an issue for the Board to consider in determining whether claimant's actual post-injury wages or his wage-earning ability should be used in computing his permanent partial general disability under K.S.A. 44-510e. But *Bergstrom* makes clear that good faith is not an element of the permanent partial general disability formula and those earlier Kansas Court of Appeals cases that treated good faith as an element of the formula are no longer valid. Consequently, claimant's actual post-injury earnings must be used in computing his permanent partial general disability. And the difference in claimant's pre- and post-injury wages is 100 percent. And that is claimant's wage loss for the permanent partial general disability formula.

As previously noted, Dr. Curtis reviewed the list of claimant's former work tasks prepared by Mr. Santner and concluded claimant could no longer perform 3 of the 17 tasks for an 18 percent task loss. Conversely, Drs. Yost, Bailey and Bieri released claimant without any permanent restrictions. But claimant's uncontradicted testimony indicated that he self limited his activities while he continued working. Consequently, the Board finds it appropriate to adopt Dr. Curtis' task loss opinion and find claimant suffered an 18 percent task loss. The Board adopts and affirms the ALJ's finding that claimant's loss of task performing ability is 18 percent. And averaging the 18 percent task loss with the 100 percent wage loss results in a 59 percent work disability.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[8] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

---

[7] *Id.* at 609-610.

[8] K.S.A. 2009 Supp. 44-555c(k).

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Brad E. Avery dated October 7, 2010, is modified to find claimant's award of compensation is limited to a K.S.A. 44-510e 59 percent work disability.

Claimant is entitled to 17 weeks of temporary total disability compensation at the rate of $510[9] per week or $8,670 followed by 37.17 weeks of permanent partial disability compensation at the rate of $510 per week or $18,956.70 for a 9 percent functional disability followed by permanent partial disability compensation at the rate of $510 per week not to exceed $100,000 for a 59 percent work disability.

As of April 22, 2011, there would be due and owing to the claimant 17 weeks of temporary total disability compensation at the rate of $510 per week in the sum of $8,670 plus 81.03 weeks of permanent partial disability compensation at the rate of $510 per week in the sum of $41,325.30 for a total due and owing of $49,995.30, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $50,004.70 shall be paid at the rate of $510 per week until fully paid or until further order from the Director.

IT IS SO ORDERED.

Dated this _____ day of April, 2011.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: George H. Pearson, Attorney for Claimant
Ali N. Marchant, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge

[9] Per stipulation filed on September 24, 2010, the parties agreed that claimant's average weekly wage after the date of accident was $772.77 which results in a maximum weekly benefit of $510.